No. 3126

In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JAMES A. MURRAY,

Appellant,

vs.

H. E. RAY, as Trustee of the Estate of Alec Murray, Bankrupt,

Appellee.

SUPPLEMENTAL BRIEF OF APPELLEE.

Appearance for Appellant:

J. BRUCE KREMER,
JAMES E. MURRAY,
Of Butte, Montana.

Appearance for Appellee:

J. M. STEVENS,
Of Pocatello, Idaho.

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ARGUMENT.

Pursuant to the propositions supplementing appellant's original brief, we wish to state to the Court that in endeavoring to follow appellant through his various arguments, we may have inadvertently caused some confusion of thought. To clarify any obscurity on the part of appellee, we shall concisely state our position and the law governing. Reference has heretofore been made by appellee to Section 60 "a" of the Bankruptcy Act. We believe that section is not controlling in this scase except that the preferential transfer may develop into fraudulent intent, as this case shows the transfer to be within the four months period prior to bankruptcy. Remington

on Bankruptcy, Second Edition, Section 1220. This action was brought by the Trustee in Bankruptcy to set aside a fraudulent conveyance of the Auditorium property made by the bankrupt to the appellant. Sections 67 "e", 70 "a" and "e" and 22, are the sections of the Bankruptcy Act in point and these sections should be read together in considering this case. Collier on Bankruptcy, Eleventh Edition, Page 1124. Under Sections 70 "a" (2), and 47 "a" (2), the trustee no longer "stands in the shoes of the bankrupt" 'but has the power of a creditor "armed with process". Collier on Bankruptcy, Eleventh Edition, page 727; In re Hammond, 188 Fed. 1020. We accept the position taken by the appellant with respect to Section 67 "e" that for the appellee to make out a *prima facie* case, it is only necessary to show fraud in fact upon the part of Alec Murray, Bankrupt, in conveying the property to the appellant and it then becomes the duty of the appellant to accept the burden and establish good faith and a fair consideration.

"In view of the fact that all property fraudulently conveyed passes to the trustee by operation of Section 70 of the Act, it is evident no reason for the adding of this Section 67 "e" could have existed had it not been that by this peculiar provision conveyances, transfers and incumbrances made by the bankrupt within the four months preceding bankruptcy are void, even if made with merely his own intent to hinder, delay and defraud creditors, unless the transferee prove his own good faith and adequate consideration. At common law and under the statutes, except this bankruptcy statute in its Section 67 "e", a

prima facie case for setting aside a transfer as fraudulent is not complete unless proof be made by the creditor of the transferee's participation in the fraudulent intent; and a suit to set aside a fraudulent conveyance, may fail precisely because of this inability to prove affirmatively the transferee's participation in the fraudulent intent.

Remington on Bankruptcy, 2nd Edition, Section 1493.

Ogden vs. Reddish, 200 Fed. 977;
In re Mahland, 184 Fed. 742.

This action comes directly under Section 70 "a" (4) for the trustee is vested with the title of the property and also with the creditors' rights with respect to the property fraudulently transferred, and is specifically affected by Section 67 "e" for the transfer was made within the four months period condemned by said section. Collier on Bankruptcy, Eleventh Edition, pages 1124 and 1062.

Appellant relies upon the purported parol trust agreement between the appellant and Alec Murray, Bankrupt, alleged to have been made at the time the Monidah Trust, a corporation, deeded the property in question to the bankrupt. Inasmuch as the appellant relies upon the parol trust agreement and concedes there was no consideration for the transfer of the property by Alec Murray to James A. Murray, he admittedly fails to establish one of the requirements under Section 67 "e", namely, a present fair consideration, consequently Section 70 "a" and "e" of the Bankruptcy Act becomes applicable for the reason that under appellant's admission he is not a

purchaser in good faith and for a present fair consideration. "Voluntary conveyances by way of a gift to avoid creditors are not limited to four months and do not have to come under Section 67 "e". "They are void under Bankrutcy Act Section 70 "a" (4) being 'property transferred by him in fraud of his creditors', title to which passes to the Trustee by operation of law." Remington on Bankruptcy, Second Edition, Page 1384. However, this case is within the four months' period. Accordingly it follows that the principal question for this Court to determine is whether the Auditorium property was impressed with a trust at the time it came into the hands of the Bankrupt and in this regard the trial court found it was not, but that the property was conveyed as a gift and the evidence shows that the transfer by the bankrupt to the appellant was also a gift (Trans. pages 56, 57, and 58).

The clever argument by appellant in which he ingeniously endeavors to make the evidence conform to the principles of law applicable, proceeds from false premises. Appellant elects in his supplemental brief to bring this proceeding exclusively under said Section 67 "e" and then straightway endeavors to avoid the exception therein "as to purchasers in good faith and for a present fair consideration" by reverting to his central idea of a parol trust agreement. Obviously this cannot be done for immediately the said exception is attempted to be avoided by appellant he brings himself under said Section 70 for the reason this section places the title to all property of the bankrupt in the Trustee, subject to all the equities as

to trusts obtaining against the bankrupt. Collier on Bankruptcy, Eleventh Edition, page 1133, *et seq.* The trouble with appellant is that he assumes the property in question is affected with a trust and endeavors to make this fit an entirely different situation. Under said Section 67 "e" "all conveyances . . . made or given by a person adjudged a bankrupt under the provisions of this act, subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on *his* part to hinder, delay or defraud his creditors or any of them, shall be null and void as against the creditors of such debtor except as to purchasers in good faith and for a present fair consideration" and appellant admits he is not a purchaser in good faith and for a present fair consideration. Accordingly it follows that unless appellant establishes the property to be affected with a trust under Section 70, the transfer is null and void.

With respect to appellant's contention as to a trust agreement affecting this property, heretofore discussed in our original brief page 4 *et seq.*, we therein cited the case of the City of Pocatello vs. James A. Murray, 23 Idaho, 447, the appellant herein, and that case renders the title to the property in question *res adjudicata* for under the issues in that case and the finding of the Court, Alec Murray, Bankrupt, held the fee simple title to the Auditorium property, the Court at page 458 saying: "It is also alleged in the answer and the facts so alleged are clearly supported by the evidence that George Winter and Alec Murray were joint owners of property in the City of Pocatello, Bannock County, Idaho, each owning a one-

half interest to the value of $25,000.00, and that such property was acquired by deed conveying a fee simple title, executed upon the 8th day of June, 1912." We respectfully ask the Court to read this case and to consider in connection therewith the testimony of James A. Murray (Trans. P. 57) where the appellant in testifying said: "This Auditorium property has never stood on the records of this county in my name. Not in the name of James Murray. I had considerable litigation against the City of Pocatello, and at one time the City of Pocatello acquired quite a large judgment against me in the State court, but I am not aware of the proceedings had in that case. At that time the record stood in the name of Mr. Winter for one-half interest, and Mr. Alec Murray for one-half interest. That arrangement was in accordance with my order and the proceedings had in that case were under my order. Whatever was done in that case by Alec Murray was under by order and under my direction. And whatever was done in that case by Mr. Winter was under my direction and under my order. Wherever there was money involved. This Mr. Chapman was an agent of mine.

"I was aware of the fact that Alec Murray deeded part of this property to Mr. Winter. I told him to, and it was reconveyed by my order."

Is it small wonder in light of this record that the appellant while on the stand failed to say what the trust agreement was, or to give any conversation concerning it? How could he, without committing perjury, give the terms of any trust agreement? Can anyone think otherwise than

as found by the learned trial Judge that the appellant made a gift of the property in question to the bankrupt?

We pass now to the question of fraud on the part of the bankrupt in transferring the property in question to the appellant (Section 67 "e" of the Bankruptcy Act), and in this regard the evidence shows:

1. Insolvency of the bankrupt both by the adjudication and the admission of the appellant (Trans. P. 59).

2. The relationship of nephew and uncle and the close business relations existing between the bankrupt and the appellant James A. Murray (Trans. pages 46, 47, 54 to 56).

3. The bankrupt held the record fee simple title to the property in question for about five years (Trans. P 40, and 41).

4. The bankrupt obtained promiscuous credit on the record title of the property in question (Trans. pp. 42 to 52).

5. The bankrupt conveyed practically all his property, the Auditorium in question, to appellant while credits procured in reliance upon the record title to the Auditorium property were owing by the bankrupt (Trans. pp. 41 to 52).

Insolvency is not a requisite element under the first clause of Section 67 "e" but is potent in establishing the fraudulent intent. Remington on Bankruptcy, Second Edition, Sections 1496 and 1499½. Holbrook vs. International Trust Company, 107 N. E. 665, (Mass.), Pollock vs. Jones, 124 Fed. 163.

The close relationship of nephew and uncle, combined

with the business relationship of a long period of years, creates a suspicion that the bankrupt gave the property to appellant to defraud his creditors and this suspicion remaining unexplained, may of itself furnish the necessary intent to defraud under Section 67 "e".

In re Johann, Federal Cases, 7331.

Compare Klinger vs. Hyman, 223 Fed. 257; Peterson vs. Mettler, 198 Fed. 938; Fouche vs. Shearer, 172 Fed. 592; Horner and Gaylord Co. vs. Miller and Bennett, 147 Fed. 295; Henkel vs. Seider, 163 Fed. 553. In each of the above cited cases the Court required explanation to show "good faith".

The other "badges" of fraud on the part of the bankrupt shown by the evidence under the bankruptcy act and under principles of equity also constitute fraud. We believe the question of fraud depends upon the motive, Coder vs. Arts, 213 U. S. 223, and that the intent to defraud is the test, Vollmer vs. Plage, 186 Fed. 598.

It is the general rule accepted by Courts that in fraud cases they will consider all of the circumstances surrounding the transaction to see whether collectively the "badges" make up the intent to defraud and this although any particular circumstance in and of itself may be entirely innocent. Johnson vs. Barrett, 237 Fed. 112. Remington on Bankruptcy, 2nd Edition, Section 1496 in its entirety.

What then was the motive in this case prompting the bankrupt to transfer the property to the appellant? In light of the showing of insolvency and of relationship

both of blood and in business, and of the heavy indebtedness of the bankrupt and his transfer of practically all of his assets in this one conveyance to his uncle, can anything be believed but that he intended to favor his uncle and defraud his creditors? While the intent to defraud is the test, that intent must be gathered from the circumstances surrounding the transaction and in the ordinary affairs of life, a person is presumed to intend that which his acts and conduct clearly bespeak. The fact is that by the conveyance by the bankrupt to his uncle, the appellant, the creditors were defrauded, all fine phrasing and learned discussion notwithstanding, and it is also a fact that the appellant herein has received property aggregating not less than $25,000.00 in value, not one cent having been paid therefor. These facts stand out unalterable by argument. Why did the appellant not produce the bankrupt at the trial and have him testify? Alec Murray is an involuntary bankrupt and not available to the Trustee. He is the person who could testify positively as to any matters concerning the trust agreement. Appellant exclaims: "Herein, we inquire, where is proof of actual fraud or actual intent to hinder or delay creditors as required under the decisions to be established by clear, convincing and satisfactory evidence?" Well, we have produced the proofs enumerated above and in turn inquire "Where is the proof of a trust agreement between James A. Murray, the Monidah Trust and Alec Murray, Bankrupt?"

To conclude it strikes us that no clearer case of fraud, under the bankruptcy act, could be established, and that

the appellant has failed to impress the Auditorium property with a trust, express or by operation of law. Upon a careful reading of the record, we do not see how this honorable Court can do otherwise than affirm the learned trial Judge, for to do equity to all parties concerned, the appellant, through his unusual business conduct, cannot be permitted to take advantage of his transactions to the manifest detriment of the creditors of the bankrupt.

Respectfully, submitted,

J. M. Stevens,
Solicitor for Appellee.